THAN SIEW BENG & ANOR v. KETUA PENGARAH JABATAN PENDAFTARAN NEGARA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ASMABI MOHAMAD J
[JUDICIAL REVIEW NO: R2-25-91-05-2014]
16 NOVEMBER 2015

CONSTITUTIONAL LAW: *Citizenship – Citizenship by operation of law – Child adopted by Malaysian parents – Failure to determine identity and citizenship of biological parents – Whether child proved to be stateless person – Applicability of International Human Rights Convention – Whether international treaties incorporated into municipal law – Whether applicants had valid grounds to demand citizenship status – Whether application for citizenship rendered frivolous – Whether applicants fulfilled requirement of art.14(1)(b) of Federal Constitution*

CHILDREN AND YOUNG PERSONS: *Adoption – Citizenship – Adoption order – Effect of – Whether adoption order could confer citizenship status on adopted child – Adoptive parents not lawful parent within meaning of art. 14 of Federal Constitution – Whether applicants had valid grounds to demand citizenship status – Whether application for citizenship rendered frivolous*

The first applicant and one Madam Lim Lee Chiew were the adopted parents of the second applicant, who was a minor. At the time of the birth of the second applicant, a birth certificate was issued with the particulars of the adopted parents stated as the biological parents. The first applicant applied for an identification card for the second applicant when the latter attained the age of 12 years old. However, the first applicant's application was rejected. Upon investigation, it was revealed that the second applicant was not the biological child of the couple and that he was taken away from his biological mother soon after his birth at a clinic. The first respondent revoked the said birth certificate and issued another birth certificate to reflect the true state surrounding the birth of the second applicant. Both the couple applied for an adoption order under the Adoption Act 1952 which was granted. Thereafter, the applicants applied for citizenship by registration under art. 15A of the Federal Constitution ('FC') but the same was rejected by the first respondent. Hence, encl. 1 was filed in this court seeking for various reliefs. The issues that arose were (i) whether the applicants had fulfilled the requirement of art. 14(1)(b) of the FC to obtain citizenship by operation of law; and (ii) whether citizenship could be acquired pursuant to an adoption order.

Held (dismissing application with costs):

(1) As the applicants had come to this court to assert that the second applicant was a stateless person, they should have demonstrated to this court that reasonable efforts had been made to locate the biological mother of the second applicant in order to determine the real identity and citizenship of the biological mother. The applicants had the burden

to prove to this court that the second applicant was a stateless person and based on the documents that were presented, the applicants had failed to discharge the burden placed on them on the standard required by law. The second applicant was not a stateless person as he did not fit the definition of a 'stateless person'. The Convention Relating To The Status of Stateless Persons defines stateless persons as person who is not considered as a national by any State under the operation of its law. Thus, s. 1(e) of Part II of the Second Schedule of the FC was inapplicable to the applicants' case and could not be used as a ground to demand for a citizenship status by operation of law under art. 14 of the FC. (paras 15-17)

(2) International treaties do not form part of the law in Malaysia unless such treaties have been incorporated into the municipal law. The court would refer to these international norms only if the same had been incorporated by way of municipal law. In so far as citizenship was concerned, the only law which provides for citizenship is the FC. As these international norms have not been incorporated into our FC, this court could not rely on these international norms. The applicant was thus not entitled to be registered as a citizen of Malaysia pursuant to art. 7 of the UN Convention of the Rights of the Child as the Convention was not in conformity with art. 14(1)(b) of the FC. The applicant had failed to satisfy to this court that the relevant treaty and/or convention had been adopted by way of a specific Act. Hence, there was no evidence to show that these International Human Rights Conventions were applicable to the factual matrix of the case to allow the said application under art. 14(1)(b) FC read together with para. 1(e) Part II, Second Schedule of the FC. (paras 28-32)

(3) The Adoption Act 1952 relates to the right and control of an adopted father has over his adopted child. However, the adoption order herein could not in any way be stretched to confer citizenship status by operation of law on the second applicant. This was due to the fact that there was a specific law, the FC, which deals with the issue concerning citizenship. In the circumstances, any matters concerning citizenship should be read and be construed within the four corners of the FC. The power relating to citizenship was therefore vested to the Federal Government and Minister of Home Affairs. In the event this court was to grant citizenship status as prayed for by the applicants, this would clearly violate the clear provisions of art. 14(1) (b) of the FC and the provisions of Part II and Part III of Sch. II of the FC. (paras 38-40)

(4) As the law is silent on matters pertaining to citizenship of an adopted child in the FC and/or in the Adoption Act, the citizenship could not be conferred on the second applicant merely because he had been adopted by a Malaysian father. Without any expressed provision in the law to say that an adoption order has implication on the citizen of the

adopted child, such implication could not be simply read into the law. This would tantamount to adding words into the legislation, which Parliament in its wisdom had no intention to do so. (para 42)

(5) Further, the couple being the adoptive parents was not the lawful parent within the meaning of art. 14 of the FC. The provision under art. 14 of the FC requires the birth parents, the biological mother and/or father of the said child to be lawful parents for the purpose of citizenship. The absence of specific law to connect the adoption order of the said child to the requirements provided for under art. 14(1)(b) of the FC would render the order applied by the applicant frivolous. As the issue of citizenship was an important and sensitive issue, Parliament in its wisdom would have expressly provided for the same if it was the intention of Parliament to confer citizenship on the adopted child *vide* an adoption order. (paras 43 & 46)

Case(s) referred to:

Airasia Bhd v. Rafizah Shima Mohamed Aris [2015] 2 CLJ 510 CA ***(refd)***

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

Foo Toon Aik v. Ketua Pendaftar Kelahiran dan Kematian, Malaysia [2012] 4 CLJ 613 HC ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC ***(refd)***

Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 FC ***(refd)***

Re D (An Infant) (1959) 1 QB 229 ***(refd)***

SIS Forum (Malaysia) v. Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) [2010] 2 MLJ 377 ***(refd)***

Legislation referred to:

Adoption Act 1952, ss. 2, 6, 9

Federal Constitution, arts. 14(1)(b), 15A, 16A, 18, 19, 22, 76, Second Schedule Part II, ss. 1(a), (b), (c), (d), (e)

Human Rights Commission of Malaysia Act 1999, s. 4(4)

Rules of Court 2012, O. 53 r. 2(2)

For the applicants - Latheefa Beebi Koya & N Surendran; M/s Daim & Gamany
For the respondents - Maisarah Juhari; SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Asmabi Mohamad J:

The Application

[1] This was an application filed by the applicants for judicial review ("encl. 1") wherein the following orders were sought from this court:

A (a) An order of *certiorari* to set aside or quash the decision made by the Secretary General in the letter dated 22 January 2014 whereby the application for citizenship of the second applicant under art. 15A of the Federal Constitution ("FC") was rejected;

B (b) An order for declaration that the second applicant is recognised as a Malaysian citizen under art. 14(1)(b) of the Federal Constitution and the second applicant had fulfilled s. 1(e) of Part II of Second Schedule of the FC;

C (c) An order of *mandamus* to instruct the first respondent to issue a Mykad identification card or a citizenship certificate to the second applicant as a Malaysian citizen under art. 14(1)(b) of the FC; and

(d) An order of declaration that the respondents have breached the fundamental rights under the FC and other laws that provide benefits and service to Malaysian citizen.

D **The Documents**

[2] For the purpose of encl. 1 the following documents were filed herein and referred to by the court:

E (a) The application for leave for judicial review dated 2 May 2014 ("encl. 1");

(b) The statement under O. 53 r. 2(2) of the Rules of Court 2012 ("ROC") ("encl. 2");

F (c) The affidavit in support of encl. 1 affirmed by Than Siew Beng on second May 2014 ("encl. 3");

(d) A declaration of person under disability by solicitor dated 2 May 2014 ("encl. 4");

(e) Notice of application for judicial review ("encl. 8") and

G (f) The respondents' affidavit in reply affirmed by Dato' Sulaiman bin Haji Keling on 30 September 2014 ("encl. 10").

Brief Background

[3] The brief background of the case had been well-illustrated by learned Senior Federal Counsel in her written submission. I could not do any better than to adopt the brief background as submitted subject to some modifications as follows:

H (a) The first applicant and one Madam Lim Lee Chiew are the adopted parents of the second applicant.

I (b) The second applicant is a minor who was born at a clinic known as Poliklinik & Surgery Wanita Taman Dato' Ahmad Razali Ampang, Malaysia on 28 September 1998.

(c) At the time of the birth of the second applicant, a birth certificate was issued with the particulars of the adopted parents, one Mr Than Siew Beng and Madam Lim Lee Chiew stated as the biological parents of the second applicant. At the time of the second applicant's birth the adopted parents had also identified themselves as being legally married (see exh. TSB2 of encl. 3).

(d) Both the adopted parents had never disclosed the fact that they were not the biological parents of the second applicant and or that they have taken the second applicant allegedly from a woman who had given birth to the second applicant at Poliklinik & Surgery Wanita, Taman Dato' Ahmad Razali Ampang ("the Poliklinik").

(e) At the time the first applicant applied for an identification card for the second applicant when the latter attained the age of 12 years old using exh. TSB2 of encl. 3 the first applicant's application was rejected as the first respondent suspected that second applicant was not the biological child of the couple.

(f) Upon investigation it was revealed that the second applicant was not the biological child of the couple but he was taken away from his biological mother soon after his birth at the abovementioned clinic. The second applicant was cared for and raised by the couple since then.

(g) Having realised that the adopted parents of the second applicant had breached the relevant law in securing exh. TSB2 of encl. 3 for the second applicant, the first respondent revoked the said birth certificate and issued another birth certificate in the form of exh. TSB6 of encl. 3 to reflect the true state surrounding the birth of the second applicant. As there was no information obtained with regards to the biological father and or mother, exh. TSB-6 contained no information pertaining to the biological parents and the relevant particulars were endorsed with "Maklumat Tidak Diperolehi".

(h) Both the couple was asked to apply for adoption order under the Adoption Act 1952 which was granted on 4 June 2012 (see exh. TSB10 of encl. 3).

(i) On 21 June 2012 the applicants had applied for citizenship by registration under art. 15A of the FC but the same was rejected by the first respondent. Hence encl. 1 was filed in this court seeking for various reliefs as stated herein.

(j) When encl. 1 came up for hearing before Her Ladyship Justice Zaleha Yusof on 1 August 2014, the applicants were only granted leave to pursue prayers (ii) & (iii) of encl. 1 (see paras. 1.1.2 and 1.1.3 herein).

A **The Issues**

[4] The issues for this court's determination could be stated as follows:

(a) Whether the applicants have fulfilled the requirement of art. 14(1)(b) of the FC to obtain citizenship by operation of law?; and

B (b) Whether citizenship could be acquired pursuant to an adoption order?

Discussion Of The Issues And Decision Of The Court

Whether The Applicants Have Fulfilled The Requirement Of Art. 14(1)(b) Of The FC To Obtain Citizenship By Operation Of Law?

C **[5]** As submitted before me, under the Malaysian law, there are four ways of acquisition of citizenship, by operation of law under art. 14 of the FC, by registration under arts. 15, 15A, 16, 16A, and 18, by naturalisation under art. 19 and by incorporation of territory under art. 22 (see part III of the FC).

D *Citizenship By Operation Of Law*

[6] Article 14 of the FC must be read together with Part II of Second Schedule of the FC which states as follows:

> Citizenship by operation of law
>
> E 14 (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
>
> (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part 1 of the Second Schedule; and
>
> F (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.
>
> (c) ...
>
> (d) ...
>
> G (e) ...

[7] Part II of the Second Schedule of the FC provides as follows:

> Part II Second Schedule
>
> H CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER MALAYSIA DAY
>
> 1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say;
>
> I (a) every person born within the Federation of whose parents one at least is at the time of the birth either a citizen or permanently resident in the Federation; and

(b) ….; and

(c) ….; and

(d) …., and

(e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.

[8] Based on art. 14 (1)(b) of the FC, read together with Part II of Second Schedule, there are five ways for a person who were born on or after Malaysia Day can become citizen by operation of law (see Part II (art. 14(1)(b)) of Second Schedule of para. 1(a), (b), (c), (d) and (e)).

[9] As alluded earlier, it is an undisputed fact that the second applicant was born in Malaysia. The applicants claimed that the second applicant was entitled to be conferred the citizenship of Malaysia by operation of law as his case fell within the scope of s. 1(e) of Part II of Second Schedule of the FC as a "person born within the Federation who is not born a citizen of any country otherwise then by virtue of this paragraph."

[10] This court would have to examine the factual matrix of this case and determine whether the second applicant was "not born a citizen of any country". As stated in the affidavits filed herein, the second applicant was born in Malaysia to a woman not known. The first applicant and his wife had sponsored the surgery of the biological mother of the second applicant and the second applicant was taken from his biological mother at the time of his birth at the Poliklinik. Therefore the burden is on the applicants to show to this court that the second applicant was not born a citizen of any country.

[11] The facts were really not disputed that the second applicant was born to another woman whose identity was not disclosed to this court. The first applicant and his wife ("the couple") had portrayed that they were the lawful parents of the second applicant at the time of birth and was issued with the birth certificate with the couple's particulars inserted as the second applicant's biological parents. However it was disclosed later and upon investigation by the first respondent the couple was not the biological parents of the second applicant.

[12] The couple had in fact given untrue statements to the first respondent and as a result of that the couple was requested by the first respondent to move for an adoption of the second applicant. As a result of that the second applicant became the adopted child of the couple pursuant to an adoption order dated 4 June 2014. (see exh. TSB10 of encl. 3). It could be gleaned from the documents that were presented before me *vide* exh. "A" of encl. 10 and exh. TSB2 of encl. 3 the second applicant was born at an identified clinic and the informant pertaining to the birth of the second applicant was the nurse at the Poliklinik by the name of Puan Hamsiah binti Shar-ie holding an Identification Number 531217-13-5612.

[13] At para. 8 of encl. 3, it was deposed by the first applicant that the couple had obtained an information that a woman was admitted to the said Poliklinik for the delivery of her child, was interested to give the unborn child away for adoption as she was not able to raise the child by herself due to financial constraint. The couple agreed to sponsor the cost of the delivery *via* a caesarean section as well as pay for the medical expenses for this woman.

[14] From the averment it would appear that the couple knew about the woman whom they have negotiated and finally paid for the medical bills relating to the birth. I believe there was no full and frank disclosure of facts pertaining to the identity of this woman. It would appear the applicants had not made reasonable attempts to trace the whereabouts of the mother either from the Poliklinik and or even from the informant who could be identified and traceable in order to provide the full and frank facts about the mother.

[15] As the applicants had come to this court to assert that the second applicant was a stateless person, the least the applicants could have done was to demonstrate to this court reasonable efforts have been made to locate the biological mother of the second applicant in order to determine the real identity and citizenship of the biological mother. The applicants had the burden to prove to this court that the second applicant is a stateless person and based on the documents that were presented before me the applicants had failed to discharge the burden placed on them on the standard required by the law. The applicants had resorted to a slip short way of applying for reliefs in the form of this judicial review application.

[16] I am of the view that s. 1(e) of Part II of Second Schedule of the FC is inapplicable to the applicants' case and cannot be used as a ground to demand for a citizenship status by operation of law under art. 14 of the FC.

[17] Therefore, the second applicant is definitely not a stateless person as he does not fit the definition of a "stateless person". The convention relating to the status of stateless persons defines stateless persons as person who is not considered as a national by any State under the operation of its law.

[18] It is to be noted that Malaysia has not ratified the abovementioned convention. Therefore, the convention can be used only as a guide to classify the types of persons who may be categorised as stateless person *de jure*, *de facto* or otherwise.

Applicability Of The International Human Rights Conventions

[19] The applicants contended that the second applicant being a child under the age of 18 is recognised under "Universal Declaration of Human Rights" ("UDHR"), and that the courts have legal duty to abide by this UDHR which is binding.

[20] As the UDHR is merely a declaration, it is not a legally binding document for this court to give effect. The UDHR is applicable in Malaysia only to the extent that it is not inconsistent with the FC. The provisions of the UDHR must be read together with s. 4(4) of the Human Rights Commission of Malaysia Act 1999 (Act 597) which provides as follows:

> For the purpose of this Act, regard shall be held to the UDHR 1948 to the extent that it is not inconsistent with the Federal Constitution.

[21] The UDHR would only be applicable upon its adoption by way of legislation pursuant to art. 76 of the FC. Article 76 of the FC states as follows:

> Article 76. Power of Parliament to legislate for States in certain cases.
>
> (1) Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say:
>
> (a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organisation of which the Federation is a member; or

[22] Unlike some other constitutions in other jurisdictions, the FC does not impose on the Malaysian courts to take cognisance of international human rights laws in any of its provision.

[23] With regard to whether UDHR and United Nations documents are binding the Federal Court in *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309; [2002] 4 MLJ 513 at pp. 385-386 (CLJ); 513-514 (MLJ) had clarified as follows:

> ... En Tun Majid bin Tun Hamzah, Senior Deputy Public Prosecutor for respondent started his rebuttal by stating *that reference to the international standards set by the 1948 Declaration (Universal Declaration of Human Rights 1948) and several other United Nations' documents on the right of access cannot be accepted as such documents are not legally binding on our Malaysian Courts. For this submission he relied on the case of Merdeka University Bhd where the 1948 Declaration was described as a non-legally binding instrument as some of its provision depart from existing and generally accepted rules. "It is merely a statement of principles devoid of any obligatory character and it is not part of our municipal law.*
>
> *Merdeka University* was decided in 1981. *This begs the question to whether acceptance of the 1948 Declaration as a non-legally binding has changed by virtue of s. 4(4) of the Human Rights Commission Act of Malaysia. In my opinion, the status and the weights to be given to the 1948 Declaration is a resolution of the General Assembly of the United Nations and not a convention subject to the usual ratification and accession requirements for treaties. By its very title it is an instrument which declares or sets out statement of principles of conduct with a view to promoting universal respect for and observance of human in nature, they do not, I consider, have the force of law or binding on the member states*. If the United Nations wanted these principles to be more than declaratory, they could have embodied them in a convention or a treaty to which member states can ratify or accede to and those principles will then have the force of law.

A The fact that regard shall be had to the 1948 Declaration as provided for under s. 4(4) of the Human Rights Commission of Malaysia Act makes no difference to my finding. This is so as my understanding of the pertinent words in the subsection that 'regard shall be had' can only mean an invitation to look at the 1948 Declaration if one is disposed to do so, consider the principles stated therein and be persuaded by them if need B be. Beyond that one is not obliged or compelled to adhere to them. This is further emphasised by the qualifying provisions of the sub-section which states that regard to the 1948 Declaration is subject to the extent that it is not inconsistent with our Constitution. In any event, on the particular facts of the appeals before us, I do not see the need to have regard to the 1948 Declaration as our own laws backed by statutes and precedents C as seen from the cases that I have spelt out in this judgment are sufficient for this court to deal with the issue of access to legal representation.

[24] Section 4(4) of the Human Rights Commission of Malaysia Act 1999 declares "for the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent D with the Federal Constitution". The HR 1999 Act defines human rights as referring to fundamental liberties as enshrined in Part II of the FC. Therefore, the provisions of the UDHR are in fact supplemental to Part II of the FC. Therefore, the UDHR may have constitutional dimension and status only if the provisions of the UDHR are not inconsistent with the FC.

E

[25] With regard to whether the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention On The Right of The Child (CRC) and International Convention On Civil And Political Rights (ICCPR) are applicable, one has to examine these international treaties against the provision of art. 76 of the FC, which had F clearly stated that these treaties and conventions would only have the force if adopted by way of the national legislation.

[26] This could be gleaned from the Court of Appeal case of *Airasia Bhd v. Rafizah Shima Mohamed Aris* [2015] 2 CLJ 510; [2014] MLJU 606 wherein the said court had held as follows:

G

[35] Malaysia is a signatory to CEDAW and ratified it in 1995. The first accession to the Convention was made with a number of reservations, as it was felt that the relevant articles were in contradiction with the provisions of the laws of the country. Following the Beijing Conference, steps were taken to review Malaysia's reservations to the Convention and H reservations for Articles 2(f), 9(1), 16(b),(d),(e) and (h) were withdrawn. The Ministry of Women, Family and Community Development (MOWFCD) had announced the Government's intention to withdraw the reservations on Article 5(a), Article 7(b) and Article 16(2). The remaining reservations were made to the following Articles:

I 9(2): equal rights with men with respect to the nationality of their children;

16(1)(a): equal rights to enter into marriage;

16(1)(c): equal rights and responsibilities during marriage and at its dissolution;

16(1)(f): equal rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of child; and

16(1)(g): the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.

[36] It should be noted that an announcement to withdraw reservations does not amount to withdrawal until an instrument of withdrawal is deposited with the Secretary General of UN.

[37] In our considered opinion, CEDAW does not have the force of law in Malaysia because the same is not enacted into any local legislation.

[38] In theoretical terms, the application of international legal systems is often explained in terms of the doctrines of incorporation (or monism) and transformation (or dualism).

… [43] The combined effect of Article 74(1) and the 'Federal List' in Ninth Schedule to the Constitution is that the Federal Parliament has exclusive power to make laws relating to external affairs and relations with other countries (including through treaties, agreements and conventions), as well as the power to implement treaties, agreements and conventions. With regard to the Executive power of the Federation, Article 39 provides that it shall be vested in 'the Yang di-Pertuan Agong and exercisable ... by him or by the Cabinet or by any Minister authorised by the Cabinet'. Since Article 80 ensures that the Executive authority of the Federation extends to all matters with respect to which Parliament may make laws, this means that the Cabinet or its authorised Minister is effectively vested with the power to do all acts necessary for negotiating, making, signing and ratifying treaties and other agreements entered into with other countries.

[44] When it comes to giving effect to treaty provisions in domestic law, however, it remains the case that for a treaty to be operative in Malaysia, legislation passed by Parliament is a must. This is despite suggestions that there may be some treaties which could be implemented locally without any necessity for the introduction of a statute. (See Heliliah bt Haji Yusof, "*Internal Application of International Law in Malaysia and Singapore*", [1969] Singapore Law Review, 62 - 71 at page 65). In other words, even though the Executive has ratified a treaty and the treaty binds the Government under international law, it has no legal effect domestically unless the legislature passes a law to give effect to that treaty."

[27] The CRC have been ratified by Malaysia in 1995. With regard to the applicability of art. 7 of the Convention of the CRC, Malaysia had placed its reservation on matters touching citizenship. Hence, art. 7 of the CRC does not absolutely bind Malaysia as its applicability is subject to the FC, national laws and national policies of the Government of Malaysia. The provisions of art. 7 of the CRC are as follows:

A Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

B 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Reservation:

C The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 2, 7, 14, 28 paragraph 1(a) and 37, of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.

D **[28]** International treaties do not form part of the law in Malaysia unless such treaties have been incorporated into the municipal law. This principle is supported by the case of *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766; [2011] 6 MLJ 297 where the Federal Court held:

E [180] On the issue whether this court should use 'international norms' embodied in the UNDRIP to interpret arts. 5 and 13 of the Federal Constitution I have only this to say. International treaties do not form part of our law, unless those provisions have been incorporated into our law. We should not use international norms as a guide to interpret our F Federal Constitution. Regarding the issue of determining the constitutionality of a statue, Abdul Hamid Mohamad PCA (as he then was) in *Public Prosecutor v. Kok Wah Kuan* [2008] 1 MLJ 1 at p. 17 had this to say:

> G So, in determining the constitutionally or otherwise of a statue under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah FJ (as His Royal Highness then was) quoting Frankfurter J said in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 (FC) said: 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it.

H **[29]** The above principle had been reiterated in *SIS Forum (Malaysia) v. Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri)* [2010] 2 MLJ 377 at p. 394 where the court held:

I [37] Secondly, in relation to the applicability of international norms and the approach as exemplified in the Australian case of *Teoh*, the position adopted by the Malaysian courts has been not to directly accept norms of international law unless they are incorporated as part of our municipal law: See *Merdeka University Berhad v. Government of Malaysia* [1981]

2 MLJ 356, for example. I do not believe this position has changed even with the passing of s. 4(4) of the Human Rights Commission Act 1999, and its exhortation that 'regard' shall be had to the Universal Declaration of Human Rights 'to the extent that it is not inconsistent with the Federal Constitution'. As for the judicial approach in *Teoh*, I note that even in Australia, this decision has had its fair share of criticism. See eg Alison Duxbury, *The impact and significance of Teoh and Lam in Groves & Lee, Australian Administrative Law - Fundamentals, Principles and Doctrines (2007; Cambridge University Press)*: 'The cases of Teoh and Lam are part of what has been termed 'a titanic struggle' between the Australian Government and the judiciary over the power to review executive decisions that fall within the ambit of the Migration Act' (at p. 300 of the book).

[30] The Malaysian courts had been consistent in their approach to adopt international norms and this could be seen through the judgments of the court discussed above. The court would refer to these international norms only if the same had been incorporated by way of municipal law. Insofar as citizenship is concern the only law which provides for citizenship is in the FC. As these international norms had not been incorporated into our FC, this court could not rely on these international norms.

[31] In view of the above, the applicant is not entitled to be registered as a citizen of Malaysia pursuant to art. 7 of the UN Convention of the Rights of the Child as the Convention is not in conformity with art. 14(1)(b) of the FC.

[32] The applicant had failed to satisfy this court that the relevant treaty and/or convention had been adopted by way of a specific Act. Hence there was no evidence before me to show that these International Human Rights Conventions are applicable to the factual matrix of the case to allow the said application under art. 14(1)(b) of the FC read together with s. 1(e) of Part II of Second Schedule of the FC.

[33] Thus, the applicant does not at all fit in with the requirement under s. 1(e) of Part II of Second Schedule of the FC.

Issue 2

Whether Citizenship Could Be Acquired Pursuant To An Adoption Order?

[34] I would also discuss briefly on the effect of the adoption order on the second applicant's citizenship. Pursuant to s. 9 of the Adoption Act 1952 (Act 257) all rights pertaining to the child had been transferred and vested on the adopted parents upon the adoption order having been granted by the court. The issue now is whether pursuant s. 9 of the Adoption Act the second applicant could acquire the citizenship of the adopted parents.

[35] The applicants were seeking citizenship status by way of art. 14(1)(b) of the FC by relying on an adoption order as in exh. TSB10 of encl. 3 because the word "parent" would also encompass the adopter as the parent. I am of

A the view that such provision could not be read in that manner as citizenship by operation of law relate back to the biological parental lineage. In the case at hand the applicants had not fulfilled the requirement of the law.

[36] Article 14(1)(b) and s. 1(e) of Part II of Second Schedule of the FC could not be read in isolation especially when the said child was born B without reasonable information pertaining to the lawful biological parents.

[37] The adoption order could not in any way be stretched to confer citizenship status by operation of law on the second applicant. The specific law on citizenship is the FC, which had clearly provided specific provision on how a person could acquire citizenship by operation of law. It would C appear by relying on his status as an adopted son of the first applicant to claim citizenship by operation of law, the applicants herein, were trying to circumvent the specific process and procedures that have been provided in the law.

D **[38]** The Adoption Act 1952 (Act 257) relates to the right and control an adopted father has over his adopted child. However, the adoption order does not at all confer the status of citizenship on the second applicant. This is due to the fact that there is a specific law, the FC, which deals with the issue concerning citizenship so any matters concerning citizenship should be read and construed within the four corners of the FC. The power relating to E citizenship must therefore is vested to the Federal Government and Minister of Home Affairs.

[39] The requirement for a person to be granted as an adopter to a child is definitely different from one another as stipulated in s. 6 of Adoption Act F 1952 (Act 257):

> The Court before making an adoption order shall be satisfied:
>
> (a) that every person whose consent is necessary under this Act, and whose consent is not dispensed with, has consented to and understands the nature and effect of the adoption order for which G application is made, and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights;
>
> (b) that the order if made will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child; H
>
> (c) that neither the Plaintiff nor the parent or guardian has received or agreed to receive, and that no person has made or given, or agreed to make or give to the Plaintiff or the parent or the guardian any payment or other reward in consideration of the adoption except such as the Court may sanction; and I
>
> (d) that there has been a substantial change in the circumstances, if it appears that the Plaintiff has made a previous application under this Act in respect of the same child.

[40] In the event this court were to grant citizenship status as prayed for by the applicants this would clearly violate the clear provisions of art. 14(1) (b) of the FC and the provisions of Part II and Part III of Schedule II of the FC.

[41] The very issue was discussed in the case of *Foo Toon Aik v. Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 4 CLJ 613; [2012] 9 MLJ 573 whereby Her Ladyship Justice Rohana Yusof (as Her Ladyship then was) in the course of Her Ladyship's judgment made the following observation on the effect of Adoption Act 1952 *vis-a-vis* the provision of art. 14 of the FC:

> [21] It is pertinent to note that there is no specific mention on the implication of the adoption order on the child and his adoptive parents (as laid out in s. 9), covers a whole range of rights of an adopted child in relation to parental rights, future custody, maintenance, education including rights to appoint guardian, consent in relation to marriage. The law is silent on matters of citizenship of an adopted child. In my view without any expressed provision in the law to say that an adoption order has implication on the citizen of the adopted child, such implication cannot be simply read into the law.
>
> [22] The objective of the deeming provision made to the adoptive child is clear. It is only for the purposes stipulated under s. 9 and no more. For that reason in my view, it cannot be extended to Art 14. Furthermore, the deeming provision cannot change the birth status of an adopted child. His birth status as envisaged by Art 14 remain the same, despite the adoption order, because the deeming provision is only for the purposes enumerated under s. 9 of the Adoption Act.
>
> [23] In the same light Art 14 does not make specific reference as to whether an adopted child can be treated as being born to a lawful parent for the purpose of Art 14. Thus it would be inappropriate to infer or to imply that an adoption order also deems an adopted child to be a natural child for purpose of citizenship status when both the Adoption Act and the constitutional provisions are silent on the same. It is my considered view that the, adoption order in this case therefore cannot be read to affect the citizenship of the adopted child, in absence of clear written provision in the law...
>
> [25] … It must be noted that Art 14 read together with Second Schedule Part II s. 1(a) lays down the requisites of a citizen by operation of law in very clear term. A person who meets all the criteria therein would qualify to become a citizen under that provision. There is no room to exercise for any discretion to be employed under Art 14. The test to be applied whether a person qualifies all the necessary requirement of Art 14. Once the requisite conditions under these provisions are met, it is automatic that a person is a citizen by operation of law.
>
> [26] It is a fact at the time of the birth he did not have a lawful parent. It is clear that there is no expressed provision under the Adoption Act to deem him to be born in a lawful parent for purpose of his citizenship. That being so in my considered view the adoption order cannot therefore

A qualify him to become a person who was born to a lawful parent at the time of his birth as envisaged by Art 14(1)(b) read together with Second Schedule Part II s. 1(a). Had the legislation intended for such a proposition either the Federal Constitution or the Adoption Act would have addressed this clearly in the respective laws. Since there is no provision in the Federal Constitution that provide for the implication of
B adoption order on Art 14, in my view it would be wrong for us to try and supplement it by mere deduction. Premised on all the above reasons the application by the Plaintiff would have to be dismissed.

[42] Upon reconciliation of the relevant provisions of the laws, which I had highlighted above, I fully agree with Her Ladyship on the interpretation of
C law, which relate to citizenship as enunciated in the above quoted case. I am of the view that since there is no express provision in the FC to confer citizenship upon his adoption, the applicants could not stretch the FC and or the Adoption Act to insist that the second applicant be granted citizenship. As the law is silent on matters pertaining to citizenship of an adopted child
D in the FC and or in the Adoption Act, I am of the view that citizenship could not be conferred on the second applicant merely because he had been adopted by a Malaysian adopted father. Without any expressed provision in the law to say that an adoption order has implication on the citizen of the adopted child, such implication cannot be simply read into the law. This would
E tantamount to adding words into the legislation, which Parliament in its wisdom had no intention to do so (see the case of *Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333; [1994] 2 MLJ 114 SC).

[43] Further the couple being the adoptive parents is not the lawful parent
F within the meaning of art. 14 of the FC. The provision under art. 14 of the FC requires the birth parents, the biological mother and or father of the said child to be lawful parents for the purpose of citizenship. The absence of specific law to connect the adoption order of the said child to the requirements provided for under art. 14(1)(b) FC will render the order
G applied by the applicants frivolous.

[44] This point was considered in an old case of *Re D (An Infant)* (1959) 1 QB 229 at p. 235 as follows:

The judge has asked what advantage is gained by making an adoption order. In property matters there are several potential advantages. An
H illegitimate child, according to the old common law, was a child of nobody, so that if the mother, grandmother or grandfather died without making a will, none of their property would ever got to the illegitimate child, because it was no relation in law to them. It was of no kin to anyone. If money was left to children by will it did not go, as a rule, to
I an illegitimate child, since the word 'children' was nearly always construed as referring only to legitimate children. That old law has been altered in a very small part, by section 9 of the Legitimacy Act, 1926. Now, if the mother of an illegitimate child dies without leaving a will, and has no legitimate children, the illegitimate child can take as next-of-kin of the

> mother. That is the only alteration. In all other respects, the old law remains. If the mother of an illegitimate child marries and has legitimate children, the illegitimate child is still excluded on an intestacy: whereas, if an adoption order is made, the illegitimate child ranks equally with the other legitimate children, the illegitimate child ranks equally with the other legitimate children ...
>
> The judge seemed to think that by making an adoption order the child is rendered legitimate. That is not the case. Illegitimacy and adoption are entirely different matters. The child remains illegitimate, but, being adopted, it becomes in law for all purpose a child of its mother and suffers none of the disabilities which attach to illegitimacy.
>
> Furthermore, as Ormerod LJ pointed out, the child, when adopted, is registered in the Adopted Children's Register, and that entry is received in evidence as if it were an entry in the Register of Births; so that if an application has to be made for the child to go to a school, or any other place where the entry is necessary, the entry in the Adopted Children's Register can be used.
>
> Thus it seems clear to me that there are clear advantages to the child if an adoption order is made ... All the circumstances must be taken into account; but it certainly no bar that the child is illegitimate.

[45] On reading s. 9 of Act 257 and guided by the above quoted cases and relevant laws as discussed above there is nothing to indicate that the second applicant is entitled to be conferred the status of citizenship by virtue of him being an adopted child of the couple.

[46] Section 9 of the Adoption Act merely covers issues pertaining to the maintenance, education, welfare and property of the child. However, s. 9 made no mention pertaining to the citizenship of the child upon his adoption pursuant to an adoption order. On the issue of citizenship, I am of the view that no matter how far one were to stretch the effects of the provision of s. 9 of the Adoption Act 1952, one will not be able to interpret s. 9 of the Adoption Act 1952 as the section which confers citizenship on the adopted child. As discussed above insofar as citizenship in concerned one has to fall back to the specific law, which regulate citizenship, the FC, as the FC did not provide for conferment of citizenship upon an adoption order having been made by the court. Section 9 could not be stretched to include conferment of citizenship. As the issue of citizenship is an important and sensitive issue, Parliament in its wisdom would have expressly provided for the same if it was the intention of Parliament to confer citizenship on the adopted child *vide* an adoption order.

Conclusion

[47] In view of the above this court has no choice but to dismiss the JR application with costs of RM1,000 to be paid by the applicants to the respondents.